84-802

No.

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In the Supreme Court of the United States

October Term, 1984

J. D. SPENCER, JR.,
Petitioner,

vs.

MISSOURI PACIFIC RAILROAD COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Railway Labor Act, 45 U.S.C. Sec. 151, *et seq.*, preempted Arkansas tort law which gave a cause of action for actual and punitive damages where there was a malicious and wilful interference with petitioner's rights under his employment contract with respondent, and therefore, whether respondent's motion for summary judgment for lack of jurisdiction over the subject matter was properly granted.

   A. Whether an intentional tort is a "minor dispute" within the purview of the Railway Labor Act, 45 U.S.C. Sec. 151, *et seq.*

2. Whether petitioner's complaint pleads a cause of action under Arkansas tort law, as stated above.

3. Whether petitioner's deposition testimony presents a jury question.

4. Whether petitioner's motion for remand of cause to state court should have been sustained.

5. Whether petitioner was required to exhaust the contractual or administrative remedies before filing suit.

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No.

In the Supreme Court of the United States

October Term, 1984

J. D. SPENCER, JR.,
Petitioner,

vs.

MISSOURI PACIFIC RAILROAD COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION

Petitioner prays that a Writ of Certiorari issue on behalf of petitioner J. D. Spencer, Jr., from the judgment of the Eighth Circuit Court of Appeals affirming dismissal of petitioner's action against respondent by the Honorable William L. Hungate, United States District Judge for the Eastern District of Missouri, for lack of subject matter jurisdiction.

OPINIONS BELOW

The opinion of the U. S. District Court is reported at 581 F. Supp. 1220. The opinion of the Eighth Circuit Court of Appeals is reported at 743 F.2d 627. No motion for rehearing was filed.

JURISDICTION

Jurisdiction in this Court is invoked under 28 U.S.C. Section 1254(1).

The date of the judgment and its entry was September 24, 1984.

No motion for rehearing was filed and no extension of time was requested for petitioning for a writ of certiorari.

The statutory provision, 28 U.S.C. Section 1254(1) confers jurisdiction to review the judgment in question by writ of certiorari:

> "Sec. 1254. Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"
>
> * * *

STATUTORY AND PROCEDURAL RULES PROVISIONS INVOLVED

28 U.S.C. Sec. 1254(1)

"Sec. 1254. Court of Appeals; Certiorari; appeal; certified questions.

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
>
> * * *

June 25, 1948, c. 646, 62 Stat. 928."

45 U.S.C. Sec. 151a

"Sec. 151a. General purposes.

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

May 20, 1926, c. 347, § 2, 44 Stat. 577; June 21, 1934, c. 691, § 2, 48 Stat. 1186.

45 U.S.C. Sec. 153

§ 153. National Railroad Adjustment Board—Establishment; composition, powers and duties; divisions; hearings and awards; judicial review

First. There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

* * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of

grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

* * *

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named. In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

* * *

May 20, 1926, c. 347, § 3, 44 Stat. 578; June 21, 1934, c. 691, § 3, 48 Stat. 1189; June 20, 1966, Pub.L. 89-456, §§ 1, 2, 80 Stat. 208, 209; Apr. 23, 1970, Pub.L. 91-234, §§ 1-6, 84 Stat. 199, 200.

STATEMENT OF FACTS

This action brought under Arkansas tort law against respondent alleging a wilful unlawful conspiracy between Defendant-Respondent, the Brotherhood of Locomotive Engineers and United Transportation Union (unions not joined as defendants) to interfere with petitioner's rights under his employment contract as fireman-engineer for Respondent. The conspiracy was carried out with resulting actual and punitive damages to petitioner. Suit was originally filed in the Circuit Court of St. Louis City, Missouri. Respondent removed the case to the U.S. District Court, Eastern District of Missouri on the alleged grounds that petitioner's rights were governed by the Railway Labor Act, 45 U.S.C. Sec. 151, *et seq.* Removal was pursuant to 28 U.S.C. Sec. 1441. Petitioner's motion to remand to state court was denied, holding that petitioner's rights were rocted in the collective bargaining agreement between the alleged conspirators and therefore the Railway Labor Act, 45 U.S.C. Sec. 151, *et seq.* governed.

Thereafter, on March 8, 1984 the U.S. District Court dismissed petitioner's suit on the ground that it had no jurisdiction over the subject matter because the Railway Labor Act had preempted the Arkansas tort law.

The interference with plaintiff's contract rights alleged in petitioner's petition filed in state court was "in regard to union rules and contractual provisions governing same, to include seniority, job assignments, time claims and grievances, work rules, places and kinds of work, holding of valid union meetings (as required by union rules) and plaintiff's relationship with defendant, with said unions and other employees of defendant." The ac-

tion was in two counts, the first for actual damages and the second for punitive damages.

The only testimony taken was that of petitioner, by deposition, a part of the record here. He testified in support of his allegations in the petition:

1. That after respondent's official had ordered a complaint of petitioner remedied, the union conspirators' representatives told the official to leave the situation (as to work assignments) as it is, and the official rescinded his corrective order, and that there was a conspiracy, as alleged. Pages 56, 57, 83, 84.

2. The conspiracy was wilful and malicious. Page 81.

3. There was no action on his claims turned in, either by the local unions or the general chairman of the unions. Also, there was no action taken by respondent's officials. Pages 36-38, 75. It was useless to appeal further. Page 83.

4. After petitioner started filing grievances, his being considered as an official of the railroad ended, and he was told by one of its officials that he was going to be fired because the filing of the grievances was resented by respondent and the unions. Pages 69, 70.

Petitioner did not pursue his grievances as he had a right to do under the collective bargaining agreement and the Railway Labor Act, 45 U.S.C. Sec. 153, First (i), because it would be futile to do so, because of the conspiracy and elected to file this suit.

REASONS FOR ALLOWANCE OF THE WRIT

1. The decision below conflicts with the holding in *Graf v. Elgin, Joliet & Eastern Ry. Co.*, C.A. Ill., 1983, 697 F.2d 771, that where the railroad and plaintiff's union colluded to prevent worker from having his grievance considered under procedures set up by collective bargaining agreement, the court has the power to award damages against both the union and employer for their violation of the Railway Labor Act, 45 U.S.C. Sec. 153, and to determine whether the grievances had merit, following federal common law to make that determination.

2. The decision below sanctioned such a departure by the District Court as to call for an exercise of this Court's power of supervision, in view of the holding in *Silkwood v. Kerr-McGee*, 464 U.S. ....., 104 S. Ct. 615, 78 L. Ed.2d 443, that the Atomic Energy Act did not preempt Oklahoma common and statutory law, so that actual and punitive damages could be awarded where defendant's acts made it "guilty of oppression, fraud, or malice, actual or presumed", and plaintiff was injured thereby.

3. The decision below decided the important question of federal law that the Railway Labor Act, 45 U.S.C. Sec. 151, *et seq.* preempted the tort law of the State of Arkansas, which question has not been, but should be settled by this Court, because it denies railroad workers any access to the courts (except to enforce an order of the Railroad Adjustment Board), therefore making the railroads judgment proof, no matter how malicious, intentional or wilful its acts, so neither actual nor punitive damages may be recovered for tortious wrongs.

4. The decision below, together with its holding in *Landfried v. Terminal R.R. Ass'n of St. Louis*, 8th Cir., 1983, 721 F.2d 254, which held that the discharge of an employee for bringing a suit for damages, following personal injuries, under the Federal Employers' Liability Act, 45 U.S.C. Sec. 151, *et seq.*, was not actionable, opens the door to emasculate the beneficent purposes of that act by injured employees' fear of being discharged if an injury claim is made.

5. The court in *Magnuson v. Burlington Northern*, 576 F.2d 1367 (9th Cir. 1978) disallowed an action for damages caused by emotional distress resulting from an intentional tort, which is in direct conflict with this court's holding in *Farmer v. United Brotherhood of Carpenters and Joiners of America*, 430 U.S. 290, 51 L. Ed.2d 338, 97 S. Ct. 1056 (1977).

6. The decision below, in effect, reverses the holdings of the Arkansas Supreme Court in the cases of *Hogue v. Sparks*, 225 S.W. 291; *Southwest Publishing Co. v. Ney*, 302 S.W.2d 538; *McCulla v. Brown*, 13 S.W.2d 314 and *Satterfield v. Rebsamen Ford*, 485 S.W.2d 192, which hold that petitioner's suit as brought, is actionable under tort law, even though plaintiff had also suffered damage from a breach of contract; the choice of which remedy to pursue being with plaintiff.

CONCLUSION

There is much divergence of judicial opinion on the preemption doctrine in railroad employee cases. Most of the holdings rule that the only rights employees have against their employers are limited to the administrative remedies of the Railway Labor Act, 45 U.S.C. Sec. 151, *et seq.* Such holdings prevent any award of damages, no matter how wilful, intentional or vicious the employer's conduct. This court has not ruled on the effect of the Railway Labor Act on intentional tort cases, although it has done so as to the Atomic Energy Act (in *Silkwood v. Kerr-McGee,* 464 U.S. ....., 104 S. Ct. 615, 78 L. Ed.2d 443) and the National Labor Relations Act (in *Farmer v. United Brotherhood of Carpenters and Joiners of America,* 430 U.S. 290, 51 L. Ed.2d 338, 97 S. Ct. 1056).

It is submitted that certiorari should be granted so that this important field of law may be clarified.

Respectfully submitted,

Jo B. Gardner
Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1438

J. D. Spencer, Jr.,
Appellant,

v.

Missouri Pacific Railroad Company,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: September 11, 1984
Filed: September 24, 1984

Before ROSS, Circuit Judge, HENLEY, Senior Circuit Judge, and BOWMAN, Circuit Judge.

PER CURIAM.

This appeal was brought by J. D. Spencer, Jr., from the dismissal of his claim against Missouri Pacific Railroad Company. The district court[1] dismissed the action for lack of subject matter jurisdiction. We affirm.

Spencer, an employee of the defendant, originally filed this action in the Circuit Court of the City of St. Louis,

1. The Honorable William L. Hungate, United States District Judge for the Eastern District of Missouri.

Missouri, alleging that the defendant and two unions conspired to interfere with his employment rights with respect to certain union rules and related contractual provisions. The defendant removed the case to the federal district court pursuant to 28 U.S.C. § 1441. The district court denied a request by Spencer to have the case remanded to state court. The court held that the dispute was rooted in the collective bargaining agreement and was therefore governed by the Railway Labor Act, 45 U.S.C. § 151, *et seq.* Thereafter, the defendant filed a motion for summary judgment alleging that the plaintiff's claims were "minor disputes" under the Act, and that such disputes were to be resolved by the National Railroad Adjustment Board. *See* 45 U.S.C. § 153. The court agreed and granted the defendant's motion. Spencer now appeals the district court's decision.

We have carefully studied the record in this case and believe that the fact findings of the district court were not clearly erroneous, and that the court was correct in its application of the law. In accordance with the rules of this court, we affirm the judgment of the district court. *See* 8TH CIR. R. 14.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

(Filed October 19, 1984)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
September Term, 1983

No. 84-1438EM

J. D. Spencer, Jr.,
Appellant,

vs.

Missouri Pacific Railroad Co.,
Appellee.

Appeal from the United States District Court for the
Eastern District of Missouri
83-1366C(3)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the said District Court and briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in accordance with the opinion of this Court. See 8th Cir. Rule 14.

September 24, 1984

A true copy.

ATTEST: /s/ Robert D. St. Vrain
Clerk, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

(Filed March 8, 1984)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 83-1366C(3)

J. D. SPENCER, JR.,
Plaintiff,

v.

MISSOURI PACIFIC RAILROAD CO.,
Defendant.

MEMORANDUM

This matter is before the Court on defendant's motion for summary judgment. Having reviewed the record and plaintiff's deposition, plaintiff's complaint will be dismissed for lack of subject matter jurisdiction.

Plaintiff initiated this action in the Circuit Court of the City of St. Louis, charging defendant with intentional conspiracy to interfere with plaintiff's employment rights, and interference with those rights. Plaintiff characterized his action as a tort action based on Arkansas law, a characterization with which the Court does not agree. As noted by the Court in its August 23, 1983, order denying plaintiff's motion to remand, plaintiff's claims are rooted in a collective bargaining agreement and are subject to the Court's jurisdiction under the Railway Labor Act, 45 U.S.C. § 151, et seq. (hereafter Act).

Defendant seeks summary judgment based on its contention that plaintiff's claims are "minor" disputes under

the Act, and that state law has been preempted by the Act's exclusive remedies. A minor dispute is one arising out of a controversy regarding the meaning of an existing collective bargaining agreement in a particular fact situation. *Landfried v. Terminal Railroad Association of St. Louis,* 554 F.Supp. 720, 722 (E.D. Mo. 1982), *aff'd,* 721 F.2d 254 (8th Cir. 1983). The Act provides for resolution of such disputes by the National Railroad Adjustment Board (hereafter NRAB). Section 153. It is undisputed that plaintiff's disputes have not been presented to the NRAB.

"The Adjustment Board was created as a tribunal consisting of workers and management to secure the prompt, orderly and final settlement of grievances that arise daily between employees and carriers regarding rates of pay, rules and working conditions." *Union Pacific Railroad Company v. Sheehan,* 439 U.S. 89, 94 (1978) (citations omitted). The NRAB's jurisdiction is "presumably exclusive, [and] an aggrieved employee must ordinarily exhaust his remedies under the statutory grievance procedures before he may seek judicial review of his claim, and even then he is limited solely 'to the judicial review of the Board's proceedings that the Act itself provides.'" *Riddle v. Trans World Airlines, Inc.,* 512 F.Supp. 75 (W.D. Mo. 1981), *quoting Andrews v. Louisville & Nashville Railroad Co.,* 406 U.S. 320, 325 (1972).

Plaintiff attempts to circumvent the Act's requirements by insisting that Arkansas law, rather than the Act, applies to his claims. His argument is without merit. In *Andrews, supra,* the Court overruled its prior decision in *Moore v. Illinois Central Railroad Co.,* 312 U.S. 630 (1941), that the Act's procedures for adjustment of minor disputes were optional and that a state could therefore accord a discharged railroad employee an alternative remedy under

state contract law. Instead, the Court concluded in *Andrews,* the Act's administrative remedy is compulsory and the plaintiff's claim of wrongful discharge was subject to the Act's requirement of submission to the NRAB for adjustment: "The fact that petitioner characterizes his claim as one for 'wrongful discharge' does not save it from the Act's mandatory provisions for the processing of grievances." *Id.* at 323-24. Plaintiff's reliance on *Robinson v. Missouri Pacific Transportation Co.*, 85 F.Supp. 235 (W.D. Ark. 1949) is misplaced, in that *Robinson* was decided prior to the Supreme Court's decision overruling *Moore.*

Moreover, the case for application of the Act's requirement to submit minor disputes to the NRAB for resolution is even more compelling here than in the *Andrews* case, where the discharged employee had expressed his intention to work elsewhere. In that case, the employer was being remitted to a decisionmaking process wherein he would be represented by a union no longer accountable to him by virtue of his membership. *See Andrews, supra* at 334 (Douglas, J., dissenting).

In this case, plaintiff has continued his employment with defendant and is a continuing union member; thus, his union must answer to him if his claim is lost. The fact that plaintiff claims conspiracy in addition to actual interference with his employment rights does not render his claim sufficiently different from normal disputes concerning interpretation of a collective bargaining agreement as to create an exception to the mandatory requirement that minor disputes be settled by the NRAB. Clearly, the source of the rights which plaintiff complains were invaded is the collective bargaining agreement to which defendant was bound.

Accordingly, defendant's motion for summary judgment will be granted and plaintiff's complaint will be dismissed for lack of subject matter jurisdiction.

Dated this 8th day of March, 1984.

/s/ William L. Hungate
United States District Judge